

(17)
No. 98-404

Supreme Court, U.S.

FILED

OCT 6 1998

OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT
— OCTOBER TERM, 1997

UNITED STATES DEPARTMENT
OF COMMERCE, *et al.*, Appellants,
vs.
UNITED STATES HOUSE OF
REPRESENTATIVES, *et al.*, Appellees.

On Appeal From The United States
District Court For the District of Columbia

**BRIEF OF AMICUS CURIAE STATE OF TEXAS
IN SUPPORT OF APPELLEES, CITY OF LOS
ANGELES, *et al.***

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

JAVIER P. GUAJARDO*
Special Assistant Attorney General
*Counsel of Record

DANIEL T. TORREZ
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191

COUNSEL FOR AMICUS CURIAE

BEST AVAILABLE COPY

24 22

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i> STATE OF TEXAS	1
STATEMENT OF CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Operational Plan of the 2000 Census is Designed to Produce the Most Accurate Figures Possible	4
II. Texas' Unique Situation Evinces the Need for Statistical Adjustment	7
A. Texas Was Undercounted in 1990 and the Undercount in 2000, Without Adjustment, Will Increase	7
B. Texas' Differential Undercount is Even More Disturbing than the Total Undercount	8
C. Texas' Hidden Populations Exacerbate the Problems of a Traditional Court	9
D. Evidence Points to a Double Digit Undercount in Colonias	11
III. The Undercount Robs Texans of Equal Representation and Federal Funds	13
A. Loss of Equal Representation	13
B. Loss of Federal Funds	13
IV. The Lower Court Opinion Jeopardizes the Secretary's and the Census Bureau's Ability to Produce Adjusted Figures for the 2000 Census	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

<i>Carey v. Klutznick</i> , 508 F. Supp 404 (S.D.N.Y. 1980)	16
<i>City of New York v. U.S. Dep't Of Commerce</i> , 34 F.3d 1114 (2nd Cir. 1994), <i>rev'd on othr</i> <i>grounds</i> , 517 U.S. 1 (1996)	16
<i>Kirkpatrick v. Preisler</i> , 394 U.S. 526 (1969)	13
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	14
<i>United States House of Representatives v.</i> <i>United States Department of Commerce</i> , 11 F.Supp.2d 76 (D.D.C. 1998)	2, 13
<i>Young v. Klutznick</i> , 497 F. Supp. 1318 (E.D. Mich. 1980), <i>rev'd on standing</i> , 652 F.2d 617 (6th Cir. 1981)	16

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV	14
U.S. CONST. art. I, §2, cl. 3	3, 13
U.S. CONST. art. II, §1, cl. 2	3

STATUTES, LEGISLATIVE MATERIALS AND RULE

13 U.S.C. § 141(a)	15
13 U.S.C. § 195	15

SUP. CT. R. 37.4	1
------------------------	---

OTHER AUTHORITIES

PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION DIVISION, PPL-47, POPULATION PROJECTIONS FOR STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2050 (1996)	8
PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION DIVISION, P25-1131, POPULATION PROJECTIONS: STATES, 1995 - 2025 (1997)	14
JENNIFER CHEESEMAN DAY, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P25-1130, POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2050 (1996)	8, 9
Guillermo X. Garcia, <i>Health Crisis Looms as Colonias</i> <i>Seek Aid</i> , AUSTIN AMERICAN-STATESMAN, Mar. 31, 1990, at B1	10
R. HOLZ & C. DAVIES, THIRD WORLD TEXAS: COLONIAS IN THE LOWER RIO GRANDE VALLEY (August 1989)(The University of Texas at Austin)	9, 10
NATIONAL RESEARCH COUNCIL'S COMMITTEE ON NATIONAL STATISTICS PANEL TO EVALUATE ALTERNATIVE CENSUS METHODS, COUNTING PEOPLE IN THE INFORMATION AGE (1994)	6
OFFICE THE ATTORNEY GENERAL OF TEXAS, SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS (1993)	12

REPORT TO CONGRESS ON THE STATUS OF THE YEAR 2000
DECENNIAL CENSUS PLANNING EFFORTS, 103D CONG.
12 (1994) (submitted by Secretary of Commerce
Ronald H. Brown) 4

TEXAS DEP'T OF HUMAN SERVICES, A SURVEY OF LIVING
CONDITIONS IN RURAL AREAS OF SOUTH AND WEST
TEXAS BORDER COUNTIES (June 1988) 9, 10

TEXAS WATER DEVELOPMENT BOARD, THE TWDB WATER
AND WASTEWATER NEEDS SURVEY OF COLONIAS IN
TEXAS (October 1992) 12

TEXAS WATER DEVELOPMENT BOARD, WATER AND
WASTEWATER SURVEY OF ECONOMICALLY DISTRESSED
AREAS (December 1996) 10

TEXAS WATER DEVELOPMENT BOARD, WATER FOR TEXAS:
WATER AND WASTEWATER NEEDS OF COLONIAS IN
TEXAS (October 1992) 12

U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS,
ASSESSMENT OF ACCURACY OF ADJUSTED VERSUS
UNADJUSTED 1990 CENSUS BASE FOR USE IN
INTERCENSAL ESTIMATES (1992) 7, 11

U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS,
CENSUS 2000 OPERATIONAL PLAN (revised April
1998) 4, 5, 6

U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS,
REPORT TO CONGRESS - THE PLAN FOR CENSUS 2000
(August 1997) *passim*

LAURA K. YAX, U.S. BUREAU OF THE CENSUS, 1990 TO
1997 ANNUAL TIME SERIES OF STATE POPULATION
ESTIMATES BY RACE AND HISPANIC ORIGIN (1990) . 9

No. 98-404

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

UNITED STATES DEPARTMENT
OF COMMERCE, *et al.*, Appellants,

vs.

UNITED STATES HOUSE OF
REPRESENTATIVES, *et al.*, Appellees.

On Appeal From The United States
District Court For the District of Columbia

BRIEF OF *AMICUS CURIAE* STATE OF TEXAS
IN SUPPORT OF APPELLEES, CITY OF LOS
ANGELES, *et al.*

INTEREST OF *AMICUS CURIAE*
STATE OF TEXAS

The Attorney General of the *amicus curiae* State of Texas submits this brief pursuant to Supreme Court Rule 37.4, on behalf of the State of Texas ("Texas") and its political subdivisions, to bring to the attention of the Court the adverse impact on Texas of the decision of the

three-judge court ("the lower court") in *United States House of Representatives v. United States Department of Commerce*, 11 F.Supp.2d 76 (D.D.C. 1998) (Memorandum Opinion Granting Plaintiffs' Motion for Summary Judgment) ("Memorandum Opinion"). Texas submits this brief in its capacity as *parens patriae* to: protect the right of all Texas residents to a fair and equitable distribution of federal funds and a fair and equitable apportionment of the United States House of Representatives. Texas also submits this brief in its capacity as *parens patriae* to ensure that the most accurate possible census figures are available for use by the state and its local political subdivisions. Additionally, Texas submits this brief in support of the position taken by Appellees City of Los Angeles, *et al.*, and urges this Court to reverse the decision of the court below.

STATEMENT OF CASE

Amicus, Texas, adopts the statement of the case and the legal arguments presented and advanced by Appellees City of Los Angeles, *et al.*, but writes to present those facts and the concomitant law surrounding the prospective undercount which are unique to Texas and its political subdivisions.

SUMMARY OF ARGUMENT

Texas is in a precarious position on the eve of the 2000 Decennial Census ("Census 2000"). It looks back in time and sees the undercount of its population in the 1990 Decennial Census and the resulting loss of federal funds and probable loss of congressional representation because of the failure to statistically adjust the census.

It looks forward to the year 2000 and sees the prospect of history repeating itself, except in the next decade the undercount in Texas will be greater. With a growing population of those that are traditionally undercounted, the loss of federal funds and equal representation would easily eclipse the losses of the last decade. These losses can be avoided by the use of statistical sampling, including nonresponse follow-up and Integrated Coverage Measurement, as currently proposed by the Bureau of the Census and supported by an overwhelming majority of scholars.

Texas may have more to lose than any other state if the total undercount and the differential undercount are not corrected. Texas – with one of the nation's largest populations of traditionally undercounted individuals – expects an undercount not only in its urban areas, but also in rural population clusters (whose extent and numbers are unique to Texas) called "colonias." Colonias stretch along Texas' international border with Mexico and contain all the demographic attributes that lead to chronic undercounting. With an estimated statewide population exceeding 392,000, colonias may constitute the most difficult enumeration problem in this country.

Texas wants nothing more than its fair share of congressional representation and federal dollars consistent with the Constitution's guarantees in art. I, § 2, cl. 3 and art. II, § 1, cl. 2. Therefore, Texas asks this Court to reverse the judgment of the lower court.

ARGUMENT

I. The Operational Plan of the 2000 Census is Designed to Produce the Most Accurate Figures Possible.

In the 1990 census, there was an alarming increase in the total undercount and the differential undercount¹ of minorities, the poor, renters, children, recent immigrants, individuals living in nontraditional housing units, highly mobile populations, and those living in neighborhood conditions that lead to resistance to outsiders. To counter this problem, the Secretary of Commerce and the U.S. Bureau of the Census ("Census Bureau"), with the cooperation of noted experts in almost every field of demography and statistics, began work on designing a comprehensive approach for taking the 2000 Census. See, e.g., REPORT TO CONGRESS ON THE STATUS OF THE YEAR 2000 DECENNIAL CENSUS PLANNING EFFORTS, 103D CONG. 12 (Jan. 26, 1994) (submitted by Secretary of Commerce Ronald H. Brown). As a result, the Department of Commerce and the Census Bureau devised a plan for the 2000 Census which will significantly reduce both the total undercount and the differential undercount. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CENSUS 2000 OPERATIONAL PLAN (revised April 1998) at II-1 ("Operational Plan").

¹ Differential undercount is the term used to describe the disproportionate undercount of certain groups -- minorities, recent immigrants, renters, children, and the poor -- relative to the total population. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, REPORT TO CONGRESS - THE PLAN FOR CENSUS (July 1997) ("Plan for Census 2000").

The Operational Plan includes an integrated set of procedures, including traditional non-sampling techniques and various statistical sampling techniques,² all geared toward producing a more accurate decennial census count. The Operational Plan and its various components constitute the only realistic approach to taking the most accurate census possible in the year 2000.

The idea that statistical sampling is somehow an extraneous procedure to taking the most accurate possible decennial census is outdated and unrealistic.³ And, pouring more public funds into door-to-door interviews will not solve the problem. See *Plan for*

² The Secretary of Commerce and the Census Bureau announced significant sampling procedures in three different programs: the use of sampling in the Postal Vacancy Check Program to verify vacant housing units; the use of "Nonresponse Follow-up" or "NRFU" to account for housing units that do not respond to the census forms by selecting, at random, a sample of nonresponding units to receive follow-up measures; and the use of a post-census survey designed to greatly improve the accuracy of the census, "Integrated Coverage Measurement" or "ICM", utilizing traditional Dual System Estimation. See *Plan for Census 2000* at 26-32.

³ Census 2000 will not be the first time that the Census Bureau has used statistical methods to correct for problems in physical enumeration and to provide a more accurate final result. As early as 1940, statistical imputation was used when an enumerator knew that a housing unit was occupied, but could not obtain information on the number of people living in that unit. In 1980, statistical imputation raised the physical enumeration total by 761,000 people. In 1970, the Census Bureau used sampling to impute people to addresses that had initially been assumed vacant via The National Vacancy Check which added 1,068,882 people, or 0.5 percent of the total, to the 1970 Census. *Plan for Census 2000* at 23.

Census 2000 at 7, citing the Panel on Census Requirements in the Year 2000 and Beyond. ("It is fruitless to continue trying to count every last person with traditional census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous censuses, will not lead to improved coverage or data quality.").

The differential undercount -- the bane of recent censuses -- cannot be significantly reduced without adjustment via statistical sampling. See NATIONAL RESEARCH COUNCIL'S COMMITTEE ON NATIONAL STATISTICS PANEL TO EVALUATE ALTERNATIVE CENSUS METHODS, COUNTING PEOPLE IN THE INFORMATION AGE at 4-53 (1994) ("Differential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement and the statistical methods associated with it. We endorse the use of integrated coverage measurement as an essential part of Census-taking in the 2000 census. . . .").

The Operational Plan for the 2000 Census includes statistical sampling and other features designed to work together to improve accuracy -- omitting statistical sampling eliminates that design's ability to achieve an accurate enumeration.

II. Texas' Unique Situation Evinces the Need for Statistical Adjustment.

A. Texas Was Undercounted in 1990 and the Undercount in 2000, Without Adjustment, Will Increase.

In 1990, Texas suffered a total undercount of 2.763 percent, compared to a 1.584 percent average nationwide total undercount.⁴ Texas not only had the third largest percentage undercount in the nation (behind the District of Columbia and New Mexico), but also the second largest total undercount. Bureau *Assessment* at Attachment 4. The undercount for Texas metropolitan cities was 3.6 percent, or 251,221.⁵ And, the total undercount for the remainder of Texas -- that is, the non-major city areas -- was 2.3 percent, or 231,517. *Id.* at Attachments 4 and 11. However, the total undercount figures for Texas only tell part of the story.

Due to Texas' increasing minority population in its inner cities and its rural areas, the 2000 Census undercount would almost certainly be larger than the 1990 undercount. The Census Bureau projects a Texas

⁴ U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, ASSESSMENT OF ACCURACY OF ADJUSTED VERSUS UNADJUSTED 1990 CENSUS BASE FOR USE IN INTERCENSAL ESTIMATES, Attachment 4 (1992) ("Bureau *Assessment*").

⁵ Texas cities with a population of 250,000 or greater, and with large minority populations, suffered the largest undercount figures: Arlington, 2.82 percent; Austin, 3.629 percent; Corpus Christi, 3.622 percent; Dallas, 3.551 percent; El Paso, 4.256 percent; Fort Worth, 3.047 percent; Houston, 3.933 percent; and San Antonio, 3.918 percent. Bureau *Assessment* at Attachment 11.

minority population of 44.0 percent by the year 2000, compared to 28.2 percent nationwide.⁶ Texas' growing population (in total and proportionately) of minorities, children (in 1990, over half of the undercounted were children),⁷ renters, the poor, and other traditionally undercounted groups, will inevitably result in an increased undercount.

B. Texas' Differential Undercount is Even More Disturbing than the Total Undercount.

Texas, then, is facing an even larger total undercount in the 2000 Census, but in many ways Texas' differential undercount⁸ is even more disturbing. The 1990 Census discriminated against minorities nationwide, and the effect was compounded in states with large minority populations. The nationwide differential undercount rate for African-Americans was 4.4 percent, and for Hispanics, 5.0 percent. *Plan for Census 2000* at 4. The effect of the differential undercount was particularly severe in Texas with an Hispanic population of 25.5 percent compared to 9.0 percent nationwide, and a total minority population of

⁶ PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION DIVISION, PPL-47, POPULATION PROJECTIONS FOR STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2025 at Detailed Table 3; see also, JENNIFER CHEESEMAN DAY, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P25-1130, POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2050 at 13 (1996) ("Cheeseman Day").

⁷ *Plan for Census 2000* at 3.

⁸ See *supra* at n.1.

39.4 percent compared to 24.4 percent in the United States.⁹ Texas not only has large numbers of the groups that are traditionally undercounted (minorities, children, renters), it also has a large colonia population, see *infra* Subsection C, which, by all accounts, is undercounted at an even dramatically higher rate.

Without the use of statistical sampling, there will be a continuing differential undercount of these populations in the 2000 Census and all Texans, from those living in the smallest cities and rural counties, to those living in its largest cities and metropolitan counties, will suffer. The loss, and accompanying injury, is real, palpable, and of constitutional magnitude.

C. Texas' Hidden Populations Exacerbate the Problems of a Traditional Count.

Texas has a unique series of rural populations called "colonias"¹⁰ along its entire 1,000-mile border with

⁹ See, LAURA K. YAX, U.S. BUREAU OF THE CENSUS, 1990 TO 1997 ANNUAL TIME SERIES OF STATE POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN (1990) ("Yax"); see also, Cheeseman Day.

¹⁰ Colonias "are highly concentrated poverty pockets that are physically and legally isolated from neighboring cities." TEXAS DEPT OF HUMAN SERVICES, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES at 1-3 (June 1988) ("TDHS"). Their "superficial appearance is similar to Third World slums such as the bidonvilles of North Africa, favelas of Brazil, or barrios of Mexico." R. HOLZ & C. DAVIES, THIRD WORLD TEXAS: COLONIAS IN THE LOWER RIO GRANDE VALLEY at 4 (August 1989) (The University of Texas at Austin) ("Holz") (underlining in original). Most colonias have unpaved streets, poor drainage, and inadequate sewage disposal systems. When it rains or the level of the Rio Grande rises they are "quagmires of slippery mud" and the houses

Mexico that are "organized [squatter-like unincorporated] cluster[s] of generally substandard houses, constructed on small lots." Holz at 3.

The most recent study estimates a statewide colonia population of over 392,000.¹¹ Most of that population is young, poor, Hispanic, and unemployed. TDHS at 2-30. Colonia residents are not proficient in English and are poorly educated. Spanish is the primary language for 68.2 percent of the residents. Of those that do use English, most neither speak nor read it well. TDHS at 2-5. Two-thirds of colonia adults did not graduate from high school. See TDHS at 4-3.

frequently "sit for several days surrounded by pools of . . . water heavily contaminated with" raw untreated sewage. Holz at 7. See also TDHS at 6-5 (43.9 percent of households reported flooding in their colonia). Colonias generally have no systems for delivering potable water. "An enduring mental image of colonias is the many one gallon, plastic water jugs that are seen in rubbish piles around the colonias." Holz at 8. Many of the poorer residents are forced to bathe in and drink the water found in irrigation and drainage ditches. See TDHS at 6-4. This water is frequently contaminated with sewage and agricultural chemicals. Holz at 8. The result is that disease is widespread. Colonia residents along the entire Texas border suffer from "highly infectious hepatitis A, nutritional disorders, diarrhea and skin rashes at five times the rate of the rest of the nation." Guillermo X. Garcia, *Health Crisis Looms as Colonias Seek Aid*, AUSTIN AMERICAN-STATESMAN, Mar. 31, 1990, at B1. See also TDHS at 3-4. Colonias do not have garbage or trash collection services. Consequently, trash piles with litter are found everywhere, as well as abandoned automobiles and discarded building materials. Holz at 10.

¹¹ TEXAS WATER DEVELOPMENT BOARD, WATER AND WASTEWATER SURVEY OF ECONOMICALLY DISTRESSED AREAS at 3 (December 1996).

Texas' unique borderland populations contain all the characteristics of areas that the U.S. Census Bureau has predicted will be undercounted: undocumented workers, those living in isolated poverty areas, and those individuals who do not read or speak English well. See *Bureau Assessment* at 3.

D. Evidence Points to a Double Digit Undercount in Colonias.

No one -- not the Census Bureau, nor any Texas state agency -- knows the precise extent of the 1990 Census undercount in Texas' colonias. But, everyone knows that the undercount was extensive.

The 1990 official census undercount of the three Texas counties with the largest colonia populations (Hidalgo, El Paso, and Cameron) was 4.1 percent, compared to 2.8 percent statewide, and 1.6 percent nationwide. *Bureau Assessment* at Attachments 4, 12. Undoubtedly, given the demography and geography of these rural settlements, the undercount in colonia areas of these counties was dramatically higher than the undercount for the counties as a whole.

The Office of the Attorney General of Texas undertook a study of colonias in Hidalgo County, Texas in 1992. The Litigation Technical Support Division located colonias in Hidalgo County relative to census block geography in order to compare the 1990 Census count of population in colonia areas with a recent comprehensive survey published by the Texas Water

Development Board ("TWDB").¹² The results were stunning.

The 1992 survey placed the colonia population of Hidalgo County at 109,337, but the 1990 Census Bureau enumeration of all census blocks in Hidalgo County containing colonias totaled only 84,373 -- an incredible 29.6 percent disparity. See OFFICE OF THE ATTORNEY GENERAL OF TEXAS, SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS (1993). Even allowing for population growth and error in the survey, the 29.6 percent disparity is startling. Indeed, the 29.6 percent discrepancy may be higher because the official count of 84,373 was the enumerated population of all census blocks containing colonias, not just the population within colonias.

Regardless of the exact size of the 1990 undercount, these colonia populations will never be accurately counted by mail-out/mail-back questionnaires or census takers going door-to-door. To those who know these areas well, that approach would be laughable. Texas pleads that an accurate count of these populations not be nullified by political machinations over the 2000 Census plan.

¹² TEXAS WATER DEVELOPMENT BOARD, WATER FOR TEXAS: WATER AND WASTEWATER NEEDS OF COLONIAS IN TEXAS (October 1992).

III. The Undercount Robs Texans of Equal Representation and Federal Funds.

A. Loss of Equal Representation.

Texas, with an ever-increasing population of groups that are traditionally undercounted, is one of a small number of fast-growing states with large minority populations at risk of losing one or more congressional seats in the year 2000 if statistical sampling is not used. Because census figures are utilized by every local governmental unit in Texas and congressional seats are reapportioned by census figures, all Texans will be robbed of their constitutional right of equal representation for equal numbers of people if the undercount is not adjusted. See, e.g., U.S. CONST. art. I, § 2, cl. 3 (requiring the apportionment of congressional representation among the several states with the principle of equal representation for equal numbers of people); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969) (the purpose of redistricting is to ensure that residents enjoy equal representation in their legislatures).

B. Loss of Federal Funds.

The Office of the Attorney General of Texas estimated that the 1990 total undercount and differential undercount, over the decade of the nineties, will cost Texas, at a minimum,¹³ \$1.87 billion in federal funds.

¹³ Undercount costs to Texas, as a result of the 1990 Census, go beyond a general estimated loss of Texas' fair share of federal funds to include costs that have never been estimated, and perhaps cannot be estimated. These costs affect all states, and arise from the misdirection of all federal spending among programs employing

This amount consists of lost federal funds for Medicaid (\$1.7 billion), AFDC (\$85.4 million), Rehabilitation Services (\$38.5 million), Social Services Block Grants (\$21.5 million), Foster Care (\$16 million), and the Federal Aid Highway Program (\$0.3 million). The loss to Texans amounts to \$107.05 per person over the course of the decade, or \$3,873.74 for each person not counted. Without an accurate statistical adjustment, Texans are facing even more severe funding losses over the next decade. Based on the Census Bureau's projected population of 20,119,000¹⁴ for Texas in the year 2000, the Office of the Attorney General of Texas estimates that an undercount similar in proportion to the 1990 Census would miss 563,332 Texans and cost the state approximately \$2.18 billion in federal funds.

The loss of funds hurts all Texans because when a state is deprived of its fair share of federal funds, it is still mandated, in many instances, to provide certain services, the costs of which come out of its general revenue fund. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (under the Fourteenth Amendment, Texas has an affirmative constitutional obligation to provide children

population-based formulas – for schools, crime prevention, health care, transportation and other purposes. For example, it is not just that Texas loses some portion of federal funds, it is also that the federal government, Texas and other states misallocate funds among programs based on the inaccurate population figures. For example, children are disproportionately undercounted, and children's programs are not properly funded as a result.

¹⁴ PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION DIVISION, P25-1131, POPULATION PROJECTIONS: STATES, 1995 - 2025 at 3 (1997).

of all its residents with an equal and free public education).

IV. The Lower Court Opinion Jeopardizes the Secretary's and the Census Bureau's Ability to Produce Adjusted Figures for the 2000 Census.

The lower court, in the critical portion of its opinion, found "that the use of statistical sampling to determine the population for purposes of the apportionment of representatives in Congress among the states violates the Census Act." Memorandum Opinion at 70. The court in analyzing the comparative dictates of 13 U.S.C. §§ 141(a)¹⁵ and 195¹⁶, reasoned that: "while § 141 permits sampling techniques and surveys in the conduct of the decennial census, that general grant is subject to the more specific 'Use of Sampling' directive in § 195, which . . . explicitly proscribes the use of sampling for apportioning representatives among the states." Memorandum Opinion at 68.

¹⁵ Section 141(a) states that "[t]he Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year . . . in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary."

¹⁶ Section 195 states that: "[e]xcept for the determination for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

The legal arguments and supporting authority, and there are many,¹⁷ exposing the weaknesses in the lower court's opinion are presented to the Court in the briefs filed by Appellees City of Los Angeles, *et al.* Texas adopts those arguments.

Congress has appropriated sufficient funds for the Census Bureau to produce a single adjusted figure for the 2000 Census. A single set of numbers, produced with limited use of sampling, would result in the most accurate and cost effective census. It would virtually eliminate the undercount that has plagued prior censuses, and it would count almost everyone, without regard to the color of their skin or how difficult they are to enumerate. The lower court's opinion eviscerates this type of census.

Faced with a court order enjoining sampling for nonresponse follow-up and Integrated Coverage

¹⁷ For example, courts have held that, taken together §§ 141(a) and 195, evidence Congress' intention that sampling may be used in a decennial census so long as it is not a substitute for traditional methods of numeration. See, *City of New York v. U.S. Dep't Of Commerce*, 34 F.3d 1114, 1125 (2nd Cir. 1994), *rev'd on other grounds*, 517 U.S. 1 (1996) ("statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged."); *Carey v. Klutznick*, 508 F. Supp 404, 415 (S.D.N.Y. 1980) ("the Census Bureau [is authorized by § 195 to] . . . utilize sampling procedures but only in addition to more traditional methods of enumeration."); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on standing*, 652 F.2d 617 (6th Cir. 1981) ("All that § 195 does is prohibit the use of figures derived solely by statistical techniques. It does not prohibit the use of statistics in addition to the more traditional measuring tools to arrive at a more accurate population count.").

Measurement, the Census Bureau would be required to pour additional funds and other resources into a less accurate traditional headcount. Under these circumstances, the Census Bureau would be forced to conduct a two-number census with one population count coming from a traditional enumeration for apportionment purposes, and another count for nonapportionment purposes based upon some revived version of the 1990 Post-Enumeration Survey ("PES").

The Census Bureau estimates that the additional costs of a traditional census, without statistical sampling, would range from \$675 million to \$800 million over and above the \$4 billion currently projected cost. *Plan for Census 2000* at 37-40. A traditional enumeration without sampling would require: following up on 100 percent of nonresponding housing units; sending enumerators to an additional 12 million nonrespondent addresses; following up on 100 percent of incomplete questionnaires; expanding partnership and promotion activities; using additional special enumeration activities; enhancing the quality assurance program; and using a PES. *Id.* After spending \$675 to \$800 million more, the Census Bureau would still deliver a less accurate census than in 1990. *Id.* at 37.

The ability of the Census Bureau to juggle two censuses -- that is, one traditional enumeration for apportionment purposes and a PES count for nonapportionment purposes -- and whether the manpower and resources to properly conduct them would be available, is questionable. Therefore, the lower court's opinion would also place the conduct of an accurate two-number census in jeopardy, and Texas, children,

minorities and other traditionally undercounted populations would be shortchanged.

CONCLUSION

For the reasons stated herein, the lower court's opinion should be reversed.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

JAVIER P. GUAJARDO*
Special Assistant Attorney General
*Counsel of Record

DANIEL T. TORREZ
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191

October 6, 1998

COUNSEL FOR *AMICUS CURIAE*